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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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Federal Communications Commission
Office of the Secretary

In the Matter of:

Review of the Policy Implications
of the Changing Video Marketplace

) MM Docket No. 91-221
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)
)

To: The Commission

**JOINT COMMENTS OF THE
FREEDOM OF EXPRESSION FOUNDATION, INC.
AND THE MEDIA INSTITUTE**

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SUMMARY

The Freedom of Expression Foundation, Inc., ("FEF") and The Media Institute, ("TMI") submit these Joint Comments in response to the Commission's *Notice of Inquiry*, released August 7, 1991, which seeks review of the policy implications of the changing video marketplace.

Because of the substantial changes which have taken place in the communications industry over the past twenty years, particularly in the video marketplace, FEF/TMI believe that the Commission should consider whether the public interest would be served by the elimination and/or substantial relaxation of its current multiple ownership and media cross-ownership rules and policies.

Specifically, FEF/TMI strongly urge the Commission to institute Rule Making proceedings, and/or to recommend to Congress statutory amendments which would (a) eliminate the National Numerical Limitation on ownership of broadcast television stations; (b) eliminate or substantially relax the alternative "national audience reach" limitations; (c) eliminate or substantially relax the Television Duopoly Rule in most media markets; (d) eliminate the Network/Cable cross-ownership policy; (e) eliminate or substantially modify the Television/Cable cross-ownership policy; and (f) eliminate the Newspaper-Broadcast cross-ownership policy.

FEF/TMI believe that the continued enforcement of these Rules and Policies no longer serves the public interest and that they are counterproductive to effective competition in today's multichannel video marketplace. More significantly, FEF/TMI submit that these Rules and Policies place a substantial and unjustified burden on the exercise of First Amendment Rights by television licensees and networks, and therefore should be eliminated or substantially modified.

TABLE OF CONTENTS

SUMMARY	i
STATEMENT OF INTEREST	1
I. INTRODUCTION	3
II. THE MULTIPLE OWNERSHIP RESTRICTIONS ON BROADCAST TELEVISION SHOULD BE ELIMINATED OR SUBSTANTIALLY RELAXED	9
A. The Explosive Growth of Alternative Video Information Sources Warrants Elimination of the Numerical and Audience Reach Restrictions	9
B. The Commission Should Substantially Relax the Television Duopoly Rule to Permit Joint Operation of Broadcast Television Stations in the Same Market	12
C. Continued Enforcement of the Numerical Limitation Rule and the Duopoly Rule is Inconsistent With the First Amendment	15
III. THE RULES AND POLICIES PRECLUDING CROSS OWNERSHIP OF CABLE TELEVISION SYSTEMS WITH TELEVISION STATIONS AND NETWORKS SHOULD BE ELIMINATED OR SUBSTANTIALLY RELAXED	18
IV. THE COMMISSION'S POLICY OF PRECLUDING CROSS OWNERSHIP OF NEWSPAPERS AND BROADCAST STATIONS SHOULD BE ELIMINATED ..	24
A. Review of the Newspaper-Broadcast Cross Ownership Rules is Appropriate	24
B. Continued Enforcement of the NBCO Policy is Unwarranted and Counterproductive to Public Interest Goals	26
C. Repeal of the NBCO Policy Would Bring About Significant Public Interest Benefits	28
CONCLUSION	29

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FREEDOM OF EXPRESSION FOUNDATION, INC. ("FEF"), and THE MEDIA INSTITUTE ("TMI"), by Counsel, and pursuant to Section 1.415 of the Rules¹ hereby respectfully submit these Joint Comments in response to the Commission's Notice of Inquiry² ("NOI"), released August 7, 1991, concerning changes in the state of the video marketplace and the public policy implications that flow from these changes.

Statement of Interest

1. *FEF.* FEF is a private membership corporation which seeks, through research and educational programs, to preserve and advance the First Amendment rights of the mass media, particularly the electronic mass media, and the freedom of the press, both print and electronic, from governmental intrusion in the editorial process and the dissemination of information by the press to the public. FEF's members and contributors include private foundations, publishers of daily newspapers, broadcast licensees, cable MSO's and program suppliers, trade associations for broadcasters and newspapers, regional telephone companies, and other corporate entities which generally support the research and educational objectives of FEF. FEF

¹47 C.F.R. §1.415.

²FCC 91-215, released August 7, 1991.

has participated in numerous Commission proceedings in the past, with a view toward assisting the Commission to develop a full and complete record concerning the First Amendment implications of public policy alternatives. Given the vast changes in the communications industry during the past two decades, which have resulted in a substantial increase in the diversity of information and outlets of communication, First Amendment considerations require the FCC to revise and “modernize” its structural and ownership regulations for television.

2. *TMI.* The Media Institute is a non-profit, tax-exempt research foundation with offices in Washington, D.C. TMI is dedicated to promoting the freest and fullest development of new communications technologies, the promotion and safeguarding of strong First Amendment protections in the laws and regulations dealing with communications technologies in the Congress, the courts, the regulatory agencies, and the states, and the preservation of a robust, competitive, and unfettered press, both electronic and print. TMI's independent research and educational activities are supported by grants and contributions from a wide range of foundations, corporations, and individuals. It is nationally and internationally recognized for its various programs concerning communications policy, the new technologies, First Amendment issues, and contemporary journalism. In furtherance of its goals, TMI publishes books and monographs, organizes First Amendment and other communications-related conferences and seminars, and files court briefs and agency comments on behalf of causes of interest.

3. FEF and TMI have a direct interest in, and shared goals concerning, the development and maintenance of a competitive system of diverse video delivery technologies, and support the adoption of policies by the Commission that would promote diversity through the lifting of artificial barriers on the ownership and control of video communications entities, and inhibit the full and robust exercise of freedom of expression by these entities.

4. More specifically, in response to the Commission's *NOI*, FEF/TMI believe the following changes should be made in the Commission's current multiple ownership and media cross-ownership policies:

- (a) The national numerical ownership limits of twelve (or, in the case of minority-controlled licensees—fourteen) television stations should be eliminated;
- (b) The alternative “national audience reach” limits of 30% and 25% for minority and nonminority licensees, respectively, should be eliminated or substantially relaxed;
- (c) The television duopoly rule should be substantially relaxed to permit joint ownership, joint operating agreements or other joint ventures to take advantage of economies of scale in the marketplace;
- (d) The Network-Cable cross-ownership Policy should be eliminated, and television networks permitted to own and operate cable systems;
- (e) The Television Licensee-Cable System cross-ownership statutory provision and rule should be repealed or substantially relaxed to permit such cross-ownership in markets where there are a number of other competing outlets for video programming;
- (f) The Newspaper-Broadcast cross-ownership policy established in 1975 should be eliminated.

FEF/TMI respectfully submit that continued enforcement of these rules and policies no longer serves public interest goals such as diversity, is counterproductive to effective competition among video media, and places significant and unjustified barriers to the exercise of First Amendment rights. The following analysis is advanced to support this thesis.

I. INTRODUCTION

A. *Development of Broadcast Ownership Policies*

5. The Commission's adoption of rules and policies restricting ownership of broadcast facilities were explicitly premised on the advancement of Commission policies that (1) discouraged possible broadcast monopolies and encouraged local initiative,³ and (2) fostered diversity of thought and viewpoint in the information marketplace.⁴ In 1938, the Commission adopted a policy creating a strong presumption against granting licenses which would create common ownership of more than one station in the same service in a particular community. This original "duopoly" policy was based largely on the perceived virtues of "diversification of service."⁵ The *presumption* against duopoly ownership became an absolute *prohibition* when the Commission adopted rules governing commercial radio service in June, 1940.⁶

6. The Commission's adoption of the commercial FM rules also contained the first restrictions on ownership based *not* on the *location* of the broadcast station(s) but rather simply on the *number* of stations under common control. The FCC adopted a "six station rule" prohibiting applicants who already owned six FM stations from acquiring additional FM stations since the ownership of an additional FM station "would result in the concentration of control of high frequency broadcasting facilities in a manner inconsistent with the public interest, convenience and necessity."⁷ Having limited the number of stations which any one owner could operate in the new FM service, as well as in the experimental television service, the

³ See e.g., *Report and Order*, 18 FCC 288 (1946); *Ownership Report and Order*, 100 FCC 2d 17 (1984) 56 RR 2d 859.

⁴ See, e.g., *Genesee Radio Corp.*, 5 FCC 183 (1938).

⁵ See, *Genesee Radio Corp.*, *supra*.

⁶ See, *Federal Communications Commission, Sixth Annual Report Fiscal Year 1940 (1941)* at 68.

⁷ See, *Rules Governing High Frequency Broadcast Stations*, 5 FR 2382, 2384 (1940).

FCC extended those limits to the more established AM service in 1946 by creating a *de facto* limit of seven.⁸

7. As FM broadcasting and Television VHF and UHF broadcasting began to develop, the application of national ownership limits to these broadcast media was a natural extension of the existing rules already developed for AM broadcasting. However, the Commission has, from time to time, articulated policies designed to *protect* a newly emerging industry, such as FM or UHF Television, and *promote* its growth, by exempting it from certain of the ownership restrictions otherwise applicable to broadcasting.⁹

8. Between 1954 and 1984, the FCC has several times revisited the numerical limitation rule, but only to question whether an absolute numerical limit, rather than geographic or nature of service limits, was the most appropriate form of regulation. In 1984, the FCC recognized that it “not only has the authority to reexamine longstanding rules as circumstances change, but it is virtually required to do so in order to ensure that it continues to regulate in the public interest.”¹⁰ Since the nature and scope of broadcasting in the United States experienced an enormous transformation between 1954 and 1984, the Commission gave serious thought to altogether eliminating its absolute numerical limit. However, out of an

⁸ The Commission denied CBS’ application to purchase an eighth AM station (KQW in San Jose, California) indicating in its decision that the company had already reached the full complement of stations the FCC would allow it to have. Later, the 7-7-7 rule was adopted, applying numerical ownership limitations to television stations as well. See, *Rules and Regulations Relating to Multiple Ownership*, 18 FCC 288 (1953).

⁹ The Commission has consistently exempted AM-FM combinations from the one-to-a-market rule, initially because FM Broadcasting was new service needing the economic support of the more established AM broadcast industry, and now because the reverse is true. See 47 CFR §73.3555(a), (b); Similarly, the Commission has always looked favorably upon requests for waivers of the one-to-a-market rule by UHF television stations where a showing could be made that (i) the UHF TV station had experienced financial losses and (ii) program diversity would not be seriously reduced by such a combination. More recently, the Commission has ruled that in the top 25 markets, no showing of a “failed station” need be made if, after the proposed combination, there would still be 30 separately owned broadcast licenses in the ADI. See 47 CFR §73.3555 NOTE 7.

¹⁰ See, *Report and Order* (“Multiple Ownership - Seven Station Rule”), 100 FCC 2d 17, 56 RR 2d 859 (1984) (citing *Geller v. FCC*, 610 F.2d 973, 46 RR 2d 721 (D.C. Cir. 1979)).

abundance of caution, it decided upon a transitional approach — the numerical limit was relaxed from a seven to twelve station limit.¹¹ In addition, the Commission announced that it would then conduct a six year detailed scrutiny of the demand for, and effects of, increased group ownership as well as permit time for the development of some of the newly emerging alternative telecommunications media. *Id.*, at para. 112.

9. As the Commission itself has recognized, dramatic changes in the video marketplace since these rules were first adopted have undermined the need for these rules on either competition or diversity grounds. This is particularly true in larger markets where the vast *numbers* of communications outlets are continually growing, which, in turn, have created novel *methods* of communication.

10. As will be shown in more detail below, the unprecedented proliferation of media, especially in large markets, and the wealth of information sources available in these markets underscores the conclusion reached by the FCC in another context that the public interest in viewpoint diversity “is fully served by the multiplicity of voices in the marketplace today.”¹²

B. Competitive Advantages Enjoyed by Alternative Video Delivery Services

11. The success of newer video delivery services in competing for audiences and advertising revenues in the marketplace appears due, in no small way, to the freedom of these services from the ownership limitations and other regulatory constraints imposed by the Commission on broadcasters. Thus, while Cable systems

¹¹A secondary limitation was placed on the multiple ownership of television stations, that the “national audience reach” of commonly owned television stations not exceed 25%. See 47 CFR §73.3555(d)(2).

¹²See, *Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, Report to Congress, 102 FCC 2d 145 (1985) (hereafter “1985 Fairness Report”).

may not be commonly owned by television licensees in the same market,¹³ and are subject to programming regulations concerning political broadcasts and other cable originated programming,¹⁴ there is no limitation on the number of channels a cable operator may reserve for its own originated programming. Nor are there limitations (other than federal antitrust regulations applicable to all businesses), of a similar nature on the number of cable systems a MSO may own nationally, or on "national audience reach."

12. Similarly, when DBS¹⁵ and MMDS¹⁶ services were first established by the Commission, licensees were made subject neither to numerical ownership limitations nor to program content regulations.¹⁷ The rationale offered by the Commission at the time was that freedom from these restrictions was necessary to assure that the new technology could get a foothold.¹⁸ Both DBS and MMDS are multichannel services. While complete and competitive DBS is not yet in place, many cities are now being served by both E and F MMDS licensees, who are subject neither to multiple ownership nor cross-ownership restrictions.

13. The chief competitive advantage of cable and the newer video over-the-air distribution services is multichannel capacity. Whereas television broadcasters and networks alike can only offer a single channel of programming, the cable and

¹³47 CFR §76.501(a).

¹⁴47 CFR §76.205; *see also*, 47 CFR §§76.209 (Personal Attack and Political Editorial Rules applied to Cablecasting), 76.213 (Lotteries), and 76.221 (Sponsorship Identification Rules).

¹⁵*Report and Order*, ("Direct Broadcast Satellites"), 51 RR 2d 1341 (1983).

¹⁶*Report and Order* ("Multichannel MDS"), 94 FCC 2d 1203, 54 RR 2d 107 (1983), *recon. denied*, 49 FR 27, 14,147, 56 RR 2d 187 (1984); *Second Report and Order*, ("Multichannel Multipoint Distribution Service"), 57 RR 2d 943, 948 (1985)

¹⁷51 RR 2d at 1366-67. The "customer-programmer" exemption created by the Commission was later struck down by the D.C. Circuit, on the basis that the FCC was not free to disregard statutory programming obligations of the Article III of the Communications Act, such as 47 USC §312(a)(7) and §315a. *See, National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1203-04 (D.C. Cir. 1984) ("*NAB v. FCC*").

¹⁸*Second Report and Order*, ("Multichannel Multipoint Distribution Service"), 57 RR 2d 943, 948 (1985); *but see, NAB v. FCC, supra*.

other video services, for virtually little or no increase in the cost of the physical plant, can, and do provide 4, 8, or, in the case of cable, as many as 150 separate channels of programming. The Commission, in other rule making contexts, has long recognized that, commensurate with joint operation of facilities come economies of scale which are translated into more capital to produce and acquire quality programming, thereby serving the public interest through both diversity and quality of programming.¹⁹ If an entire video services industry is precluded from the economic benefits to be derived from joint or multichannel operation, and other services are not, it is clear that the former must operate at a competitive disadvantage, and that there is not a level playing field.

14. Finally, broadcast television is at a competitive disadvantage because its revenues are derived solely from advertiser sponsorship of programming, a single income stream less responsive to consumer demand than subscriber fees. Other video services, such as *cable*, have two revenue sources—advertising revenues *and* subscriber fees. As the Commission's Office of Plans and Policy noted in its recent Working Paper on broadcast television in the multichannel video marketplace:

Cable networks can earn more revenue than broadcasters from audiences of equal sizes. For basic cable networks, this is because they collect fees from both advertisers and subscribers. For pay networks, it is because viewers value programming more highly than advertisers value viewers. This makes it possible for cable to outbid broadcasters for national or regional rights to programming, such as sports, where cable audiences are large.²⁰

Accordingly, broadcast television is at a competitive disadvantage *vis-a-vis* other video delivery systems for both structural and regulatory reasons. FEF/TMI respectfully suggest that the regulatory barriers to effective competition by broadcast television in the video marketplace are no longer necessary, are actually counterpro-

¹⁹*Multiple Ownership Rules, supra.* see also, *Notice of Proposed Rule Making* in MM Docket No. 91-140 ("Revision of Radio Rules and Policies"), 6 FCC Rcd 3275, ¶4 (1991).

²⁰Setzer, F. and Levy, J., *Broadcast Television in a Multichannel Marketplace*, FCC, OFFICE OF PLANS AND POLICY WORKING PAPER NO. 26, p. 79 (June 1991) ("OPP WORKING PAPER").

ductive to the Commission's primary goals concerning diversity, and are an undue burden and totally unjustifiable curtailment of broadcasters' First Amendment rights. FEF/TMI strongly recommend the elimination of these regulatory constraints on ownership as soon as possible.

II. THE MULTIPLE OWNERSHIP RESTRICTIONS ON BROADCAST TELEVISION SHOULD BE ELIMINATED OR SUBSTANTIALLY RELAXED.

A. The Explosive Growth of Alternative Video Information Sources Warrants Elimination of the National Numerical and "Audience Reach" Restrictions on Broadcast Television Ownership.

15. As noted above, the Commission has had occasion in the recent past to examine the state of both national and local video markets.²¹ The enormous proliferation of video delivery systems over the last decade through both existing and new and emerging technologies is a matter of public record.²²

16. There has been a substantial increase in the availability of alternative media delivery systems which has added to viewpoint diversity and has stimulated economic competition in the marketplace. Since 1970, the number of cable television systems has more than tripled, and the number of subscribers has expanded almost tenfold.²³ Today, there are approximately 10,823 cable systems operating in the U.S., accounting for almost 54 million subscribers out of the 92.1 million T.V.

²¹See, *Syracuse Peace Council*, 2 FCC Rcd 5043, 63 RR 2d 541 (1987); *Notice of Inquiry and Notice of Proposed Rule Making* ("Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries"), 2 FCC Rcd. 2393 (1987); *Radio Notice*, 2 FCC Rcd. 1138 (1987); *Report*, 102 FCC 2d 143, 58 RR 2d 1137 (1985); *Regional Concentration Rules*, 101 FCC 2d 402, 55 RR 2d 1389 (1984); *National Multiple Ownership Rules*, 100 FCC 2d 17, 56 RR 2d 859 (1984).

²²FCC records indicate that, since 1970, the total number of AM, FM and Television Stations has increased by over 50%. See, e.g., *Second Report & Order*, MM Docket No. 87-7, 4 FCC Rcd 1741, 65 RR 2d 1589, 1592 (1989).

²³See, TELEVISION AND CABLE FACTBOOK, *Cable and Services Volume*, 1987 Edition, Number 55, at A-40.

households in this country. Thus, cable penetrates almost 59% of the TV households in the U.S.²⁴ Households “passed by” constitute an even larger percentage. Similarly, there has been a rapid and widespread acceptance of VCR’s, which were virtually nonexistent in 1970. The number of VCR’s jumped from 40.4 million in 1987 to 48.63 million in 1988, an increase of more than 20% in just one year.²⁵ Additionally, the number of subscribers to satellite master antenna systems, multipoint distribution systems and multichannel MDS systems and other “wireless cable” services,²⁶ has also increased rapidly, and the print media have also continued to make important contributions to viewpoint diversity and provide further economic competition in local markets.²⁷

17. As the Commission noted in its *Second Report and Order in MM Docket No. 87-7*, since 1970 the number of broadcast outlets at the *local* level has increased dramatically throughout small, medium and large sized media markets. According to the FCC’s findings, the top 25 markets average 13.4 over-the-air television signals, 29.8 commercial AM stations, 29.2 commercial FM stations, 41.9 programmed cable channels in use with a 44% penetration rate, 2.8 locally published or significantly read newspapers, 12 significantly-read magazines, and a VCR penetration rate of 54.1%. And, as far as the smaller markets are concerned, they too have an abundance of communications outlets. For example, the smallest media markets (market size 201-209) have about nine radio and television outlets, as well as an average access to an additional 20 cable channels. Finally, although the number of significantly read daily newspapers declines from an average 2.8 dailies in the top 25 markets to 0.7 in markets 201-209, the average number of significantly read

²⁴See, *Summary of Broadcasting & Cable*, BROADCASTING MAGAZINE, July 29, 1991 at page 75.

²⁵See, *THE KAGAN MEDIA INDEX*, Paul Kagan Associates, Inc., May 17, 1988, at 3.

²⁶See, *Report and Order*, 5 FCC Rcd. 6410 (1990) (“*Wireless Cable Order*”).

²⁷ See, *Second Report and Order*, *MM Docket No. 87-7*, 65 RR 2d at 1593 (1989).

magazines remains relatively constant at about 11 for each market group. *Second Report and Order, supra*, 65 RR 2d at 1592-93.

18. The Commission has previously recognized that its diversity policies must be analyzed within the broad framework of the information marketplace and the diverse technologies that exist within that marketplace for the delivery of information to consumers.²⁸ These technologies include not only those of the mature and still growing broadcast and cable industries, but new and emerging services and/or technologies such as Low Power Television, wireless cable, and information services available through personal computers or other video terminals. Advances driven by the merging of computer and communications technologies, fostered by the FCC's own deregulatory initiatives, and the remarkable decline in the costs of computer processing, have led to the emergence of entire new industries devoted to providing consumers with access to an unparalleled range of information sources.²⁹

19. Although there has been a tremendous growth in the number of media outlets on a national basis, the fact that the smaller markets have an abundance of new sources of information demonstrates that there is substantial diversity on the local level as well. For example, 94% of the television households in the U.S. receive five or more TV signals, up from 79% in 1975.³⁰

20. Given the growth of radio, television, cable television, VCR's, satellite master antenna systems, wireless cable services, and the computer-information processing technologies, it would be difficult to dispute that the Commission's goal

²⁸ See e.g., *Television Deregulation*, 98 FCC 2d 1076, 1138, 56 RR 2d 1005; *National Multiple Ownership Rules*, 56 RR 2d at 864.

²⁹ In 1981 the penetration of personal computers in the home market was 340,000 units. By the end of 1985, penetration had increased to an estimated 12 million units. See, Huber, *The Geodesic Network*, 1987 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY.

³⁰ See, OPP WORKING PAPER at 17.

of establishing media diversity in substantially all media markets has been achieved.³¹ The elimination of numerical restrictions on the ownership of television station outlets would thus not undermine, in any significant way, the diversity of video programming now available to the public in virtually every market.

21. Moreover, an artificially low limit on national audience reach does nothing to advance program diversity, and may, in fact, thwart it, since such a rule does not take into account the number of video services already available in either the average, or a particular video market. Elimination of the absolute numerical and “national audience reach” limitations in 47 CFR §73.3555(d)(2) would likely promote diversity of programming by permitting existing and emerging multiple owners entry into a greater number of video markets. Economies of scale achieved by ownership of a greater number of stations than twelve would make entry into small markets more economically attractive, thereby creating greater, not lesser, program diversity in those markets.

22. With an abundance of video program sources available in every size media market, the Commission should review its reasoning behind instituting numerical ownership limitations and recognize that such regulations are no longer warranted. As noted above, given the varied choices of communications outlets available to consumers in all sized media markets, diversity of opinion and information is no longer a viable concern.

23. Accordingly, FEF/TMI strongly urge the Commission to propose amending Section 73.3555 of the Rules to eliminate the national numerical limitation as well as the “audience reach” restrictions for broadcast television.

B. The Commission Should Substantially Relax the Television Duopoly Rule to Permit Joint Operation of Broadcast Television Stations in the Same Market.

³¹ The fact that the various media may not be perfect substitutes for one another does not negate their status as competing, antagonistic sources of information for the purposes of diversity analysis.

24. From the previous analysis, it is apparent that, however warranted may have been the Commission's concerns about media concentration of control in local markets twenty years ago, those concerns are no longer valid today. Now, the *average* market has 36 cable channels, 10 over the air television signals, 20.4 AM and 19.5 FM radio signals, 1.9 newspapers, 11.8 magazines with subscription rates figures of at least 5%, and a VCR penetration rate of 48.7%. With such a proliferation of media outlets in the *average* market and such a diverse range of viewing choices for the citizen presently available even in small markets, the Commission should reexamine its duopoly restrictions with respect to both radio and television.³²

25. If the Commission's concern in limiting television ownership to "one-to-a-market," is undue concentration of control over the alternative viewing sources of information in a market, then surely, the local cable system operator, who controls the distribution of as many as 100 different channels with penetration as high as 45% of households, has the greatest concentration of control. The broadcast television licensee, with only one channel of programming to offer the local audience, would have the least. While there may be situations in a few small markets where concerns over the potential adverse impact television duopolies might have legitimacy, such concerns have little or no validity whatever in the vast majority of television markets today.

26. In fact, the current television duopoly rules, to the extent that they impede the competitiveness of television licensees *vis-a-vis* other video programming suppliers, may be counterproductive to the Commission's diversity goals. The decline in local broadcast television revenues ultimately will be reflected in lower quality programming, and fewer viewing choices for the public. According to the Office of

³²With respect to radio, the Commission is undertaking an examination of its multiple ownership rules in MM Docket No. 91-140.

Plans and Policy, this will happen sooner, and more severely in smaller markets than in larger markets.³³

27. The substantial rise in the multiplicity of media outlets considerably undercuts both the diversity and economic competition justifications that have long served as the justification of multiple ownership limitations on the local level. First, the increase in the total base number of stations invariably dilutes the relative significance of multiple ownership within a market as a potential threat to adequate program diversity. Since the broadcast ownership restrictions were adopted at a time when the total number of stations was substantially less than exists today, the likelihood was much greater that multiple ownership could confer considerable sway over public opinion. However, in today's telecommunications marketplace, with its myriad voices, such an outcome is highly unlikely.³⁴

28. Accordingly FEF/TMI respectfully urge the Commission to propose an amendment to 47 CFR §73.3555 which would permit dual ownership of more than one television broadcast license in a market, upon a showing that there are sufficient additional video programming sources in the marketplace to ensure that the Commission's diversity goals would not be adversely affected. In all but the smallest markets, the Commission should instruct its Staff routinely to grant such applications. In very small markets, a case-by-case approach might need to be undertaken. Such an approach, in addition to counteracting the continuing decline of broadcast television *viz* its competitors, would be the least restrictive means of furthering an

³³ "In markets below the top ten, more than half of all independent stations are already experiencing losses, at least on paper. Here, a reduction in the number of stations may occur, which would reduce over-the-air choice.... The number of broadcast markets in which broadcast stations provide a competitive check on cable systems probably will [also] decline."

OPP WORKING PAPER, *supra*, at 160.

³⁴ Similarly, the growth in media outlets directly diminishes the likelihood that multiple ownership within the same service in a particular market might afford licensees sufficient economic power to permit anti-competitive behavior. As the number of alternative outlets rises, the capacity of any given level of group ownership artificially to restrict output and increase prices necessarily declines.

important governmental interest in promoting viewer choice.³⁵ As argued below, FEF/TMI believe the Commission is *constitutionally obliged* to modify its rules to be the least intrusive on First Amendment rights in pursuing its public interest goals.

C. Continued Enforcement of the Numerical Limitation Rule and the Duopoly Rule is Inconsistent With the First Amendment

29. The ownership regulations that television broadcasters must observe were put in place to maximize outlets for local expression and ensure diversification of programming. Unfortunately, the regulations no longer effectuate these policies. Eliminating the stringent ownership rules would allow broadcasters to compete more effectively, thereby ensuring quality and diversity in programming for the public. The ownership rules not only stifle productivity, but also infringe upon broadcasters' First Amendment rights: television broadcasters are prevented from freely selecting the media to present their programming to the public, and are also denied the ability to bargain for better programming. The structural limitations placed on broadcasters thus eliminate from particular markets and the public major providers of information.

30. To be constitutional, governmental regulations which favor certain classes of speakers over others must be supported with a compelling state interest.³⁶ The scarcity and diversity rationales do not adequately justify such rules in light of the enormous sea of video programming and information available to consumers. From a First Amendment perspective, broadcast television is not so unique when compared to other mass media information sources. The First Amendment would be better served by placing broadcasters on equal footing with other information

³⁵*Cf. United States v. O'Brien*, 391 U.S. 367 (1968).

³⁶*Home Box Office*, 567 F.2d at 47-48 (D.C. Cir. 1977)

providers. In short, “[T]he public interest in diverse video options is best served by deferring to the marketplace.”³⁷

31. Although it is unclear exactly how the Commission’s ownership restrictions are serving or protecting the public, the regulations must be closely tailored to further an important government interest.³⁸ If diversity is the interest served by the ownership rules, then the regulations are overinclusive. One has only to look at the diversity of programming and sources in the New York SMA to realize that these concerns are overstated. For example, Time-Warner’s plans for a 150 channel system in New York City³⁹ inflate the concept of “overchoice” to hyperbolic proportions.

32. For the reasons advanced above, the continued enforcement of the multiple ownership numerical limitations and the duopoly rule no longer serve the public interest and raise serious questions of consistency with First Amendment principles. For it is clear that, absent a sufficiently important and continuing compelling governmental interest, regulations which either directly abridge freedom of expression or, by their application restrict such expression, are constitutionally suspect. *United States v. O'Brien*, *supra*.

33. There can be no dispute over whether either the numerical ownership limitations or the duopoly restrictions impinge upon the broadcaster’s First Amendment rights. Although the regulation professes to be content neutral, restricting only ownership of broadcast facilities, and not the content of their expression, it is precisely the nature of ownership that the Commission has asserted would advance or retard its own First Amendment objectives:

The significance of ownership from the standpoint of “the widest possible dissemination of information” lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation,

³⁷*Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (1985).

³⁸*United States v. O'Brien*, 391 U.S. at 377 (1968).

³⁹“Time Warner Constructing a 2-Way Cable TV System,” N. Y. TIMES, March 8, 1991, p. D-5.

all of which are a critical aspect of the Commission's concern with the public interest.⁴⁰

It necessarily follows that restrictions on ownership impinge directly on freedom of expression by determining who may speak and who may not. Under the present multiple ownership rules, certain broadcasters are denied the right to acquire additional broadcast licenses solely because the government is trying to prevent outdated perceptions — threats to the diversity of opinion or marketplace competition. The rules dictate where a broadcaster may exercise his freedom of expression, which is contrary to the well established principle that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right — especially the right to freedom of expression. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Shapiro v. Thompson*, 394 U.S. 618 (1968).⁴¹

34. A government regulation which restricts or otherwise has an adverse impact on an individual's or group's freedom of expression is justified only to the extent that (a) it furthers an important or substantial governmental interest (*i.e.*, one that addresses an evil that the government has the right to prevent), (b) is unrelated to the suppression of content of speech, or (c) the incidental restriction upon freedom of expression caused by enforcement of the regulation is no greater than necessary to achieve that interest. *United States v. O'Brien*, *supra*.

35. The two primary reasons why the FCC adopted numerical ownership restrictions and the duopoly rule were to further the policy of promoting diversity of

⁴⁰ See, *Newspaper-Broadcast Cross Ownership Policy*, 32 RR 2d 954, 959 (1975) (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

⁴¹ See also, *Buckley v. Valeo*, 424 U.S. 1 (1974), wherein the Court held that forced choices in the Federal Election Campaign Act which limited expenditures of individuals or groups supporting a candidate were held to be an unconstitutional abridgment of freedom of speech. In striking down that part of the legislation, the Court rejected the notion that Government, under the Constitution, could act to equalize the relative ability of individuals and groups to influence the outcome of elections. Rather, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment..." 424 U.S., at 48-49.

viewpoints in media markets, and prevent monopolistic practices within the broadcast industry. Given the fact that the Commission has officially proclaimed that the goal of diversity has been achieved in virtually all media markets, it must follow that restrictions on freedom of expression can no longer be justified by reference to such a goal. And, except for a handful of the smallest markets where antitrust considerations may warrant some scrutiny of media ownership, such diversity guarantees an absence of monopolization of the means of expression in a given media market. Whatever validity the current numerical ownership restrictions or duopoly rule may once have had, it no longer exists.

36. Where the underlying public interest consideration for a regulation is no longer valid, the rule cannot withstand constitutional scrutiny. *See, Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) ("Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears."); *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) ("[R]egulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." [citations omitted]).

III. THE RULES AND POLICIES PRECLUDING CROSS OWNERSHIP OF CABLE TELEVISION SYSTEMS WITH TELEVISION STATIONS AND NETWORKS SHOULD BE ELIMINATED OR SUBSTANTIALLY RELAXED.

37. Cross ownership rules and numerical limits to television ownership developed at a time when television broadcasting was dominated by the three television networks. In 1970, some 87% of the country's 690 commercial television stations were network owned or affiliated,⁴² and there were only 182 public

⁴² *See, Syndication and Financial Interest Rules*, "Tentative Decision and Request for Further Comments," 94 FCC 2d 1019, 1057, 54 RR 2d 457, 482 (1983).

television stations.⁴³ National cable penetration stood at only 6.6%,⁴⁴ and VCR ownership/penetration was negligible.⁴⁵

38. The Commission was justifiably concerned, at the time, with the *dominance* by the networks over the total video program fare *available* in most American households, particularly in prime time.⁴⁶ The Commission also feared that national networks might employ cable ownership to stifle the growth of that competing transmission medium and the national program services that cable might carry.⁴⁷ Accordingly, the Commission adopted a rule prohibiting ownership of a cable television system by a national television network, or the common ownership of a television station and a cable system in the same or substantially the same service area.⁴⁸

39. The relevant characteristics of television broadcasting and network dominance have changed dramatically since 1970. Today, well over one-third of the

⁴³See, *Notice of Proposed Rule Making*, ("Commercial TV Stations"), 94 FCC 2d 678, 710 (1983).

⁴⁴ National Telecommunications and Information Administration, *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations*, NTIA REPORT NO. 88-233 (1988) ("NTIA REPORT") at 10.

⁴⁵In 1975, there were only 30,000 VCR's in use. See, TELEVISION AND CABLE FACTBOOK, at C-300 (1988).

⁴⁶ See *CATV*, 23 FCC 2d at 819, 821. Cf., *Report and Order*, ("Network Television Broadcasting"), 23 FCC 2d 382, 394, 18 RR 2d 1825 (1970) ("Only three organizations control access to the crucial prime time evening television schedule"); see also, TELEVISION AND CABLE FACTBOOK, at 385-86.

⁴⁷ See *CATV*, 23 FCC 2d at 819, 821.

⁴⁸Adopted in 1970, 47 CFR §76.501(a) provides:

(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in:

(1) A national television network (such as ABC, CBS, or NBC); or
(2) A TV broadcast station whose predicted Grade B contour, computed in accordance with §73.684 of Part 73 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).

Congress later codified the television station-cable system cross-ownership restriction in the CABLE COMMUNICATIONS POLICY ACT OF 1984; see, 47 U.S.C. §613(a).

nation's 1,131 commercial television stations⁴⁹ are independents;⁵⁰ sixteen of the top-20 markets have four or more independents; forty-three of the top-50 have two or more; and one or more independents operate in markets containing some 90% of the country's television homes.⁵¹ Further, over 90% of the country's households have access to cable television;⁵² 52.8% of households with television now subscribe;⁵³ and 60% of those households have VCR's.⁵⁴

40. As video distribution sources in the marketplace have proliferated in the past twenty years, the percentage of the audience and profits "controlled" by over-the-air television has correspondingly declined. For both affiliates and independents, average profits show a pronounced downward trend over the last half of the 1980's.⁵⁵ This decline in profits is due to increased competition from the cable industry. Audience shares have decreased for the major networks. The percentages of prime time network viewing dropped from 73 percent in 1982-83 to 58 percent in 1989-90.⁵⁶ With reduced audience shares, network television takes in less revenue from advertising. Instead of operating as the dominant force in the marketplace, television broadcasters operate at a competitive disadvantage to cable. Cable has had the advantage of operating as a "*de facto* monopoly,"⁵⁷ relying on dual revenue streams, and avoiding overly restrictive broadcast regulations.

⁴⁹FCC News Release, "Broadcast Station Totals as of October 31, 1991," Mimeo No. 20526, (released Nov. 7, 1991).

⁵⁰See OPP WORKING PAPER at 15.

⁵¹NIELSEN TELEVISION INDEX, October, 1988.

⁵²OPP WORKING PAPER at 70.

⁵³See, "Summary of Broadcasting and Cable," BROADCASTING MAGAZINE, July 29, 1991 page 75; OPP WORKING PAPER at 70.

⁵⁴OPP WORKING PAPER at 106.

⁵⁵NAB TELEVISION FINANCIAL REPORT, 1990, pp. 1-16.

⁵⁶OPP Working Paper, *supra*.

⁵⁷See, Brenner, D., *Was Cable Television a Monopoly?*, 42 FED. COMM. L. J. 365, July 1990.

41. Accordingly, it can no longer be maintained that national broadcast networks dominate access to the great bulk of the country's television screens, in prime time or any other part of the broadcast day. While it may be true that, in the aggregate, networks have a 70% share of prime-time viewing in non-cable homes, and a collective 50% share in cable households, for purposes of diversity analysis, the three major television networks—ABC, CBS and NBC—are clearly independent, antagonistic program sources—not a collectivity. A per-network average 23% share of prime time audience does not suggest anything approaching a dominating influence over viewers.⁵⁸

42. In 1983, the Commission found (on the basis of an unchallenged showing) that ABC, CBS and NBC had a *collective* 54% share of video program expenditures.⁵⁹ On the basis of that finding and a wealth of other evidence, it rejected claims that those networks had collective monopsony power in the video program market.⁶⁰ In 1987, that share had fallen to 44%.⁶¹ Plainly, no individual network can exercise market power over program suppliers.

43. Concern has been expressed in the past over whether network ownership of cable systems might be employed to extract unfair advantages for networks

⁵⁸Moreover, the Commission's policy favoring a diversity of program sources seeks to ensure the breadth of *choice* available to the public — not to limit the popularity of any particular program source. Indeed, any governmental attempt to burden or restrict particular program sources *because* of its popularity would raise the gravest First Amendment questions. See *Minneapolis Star v. Minnesota Commission of Revenue*, 460 U.S. 575, 591-93 (1983). Cf. *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 810-14, 64 RR 2d 1309 (D.C. Cir. 1988).

⁵⁹*Syndication and Financial Interest Rules*, *supra.*, 94 FCC 2d. at 1060, 1064 (1983).

⁶⁰*Id.* at 1063-66.

⁶¹Estimated video program expenditures for 1987 were as follows: (1) ABC, CBS and NBC — \$5.105 billion, (2) pay cable networks — \$1.060 billion, (3) basic cable networks — \$0.700 billion, (4) TV station expenditures on syndicated program — \$1.538 billion, and (5) VCR (rental outlets and direct sales) — \$3.325 billion. See, KAGAN MEDIA INDEX, *supra.*, and VIDEO MARKETING NEWSLETTER (Oct. 3 and Oct. 31, 1988). It should be noted that these estimates exclude (a) program expenditures by the Fox Network, (b) expenditures on U.S.-produced programs by foreign media (although some portion of those expenditures were on programs *not* produced initially for U.S. network exhibition), and (c) payments by motion picture theaters (although the basic production inputs — actors, producers, directors, etc. — are often the same as those for programs produced initially for home video exhibition). The collective 44% market share attributed to ABC, CBS and NBC is thus, if anything, an overestimate.

in their dealings with affiliates concerning compensation and program clearances. Recent events⁶² have demonstrated that networks and affiliates are mutually inter-dependent, and will continue to be so for the foreseeable future.

44. The network-affiliate relationship is properly described as a partnership, because each partner brings to the venture something that the other needs. Neither has market power over the other. The relative bargaining positions of the partners are affected by a variety of factors: the number of competitively effective station facilities available in the particular market,⁶³ the relative strength of the affiliate's non-network programming, the strength of the programming offered by the network in comparison with the alternate programming available to the affiliate, and many others. The parties also have a major stake in the continuity of the relationship, in which each invests substantial resources and promotional effort. Both have strong incentive to avoid disrupting the relationship in any but the most extreme circumstances. The balance of bargaining advantage shifts over the years in response to changes in such factors.⁶⁴ It should be readily apparent, however, that the market for television stations would not value network affiliations as highly as it does, if affiliates did not have bargaining power to arrive at relationships with their networks that are highly beneficial to them.

45. Even if these obvious facts are ignored, there is no reason to believe that ownership of cable systems by networks would materially alter the relationship. Any threat by a network to bypass broadcast outlets in favor of distribution via its own cable system would lack credibility. *For the foreseeable future, the cable systems*

⁶²CBS, Affiliates to Re-examine 'Partnership,' BROADCASTING, October 21, 1991, pp 23-24.

⁶³ Thus, a station owner in a market with only two stations (or a VHF owner in a market with only two VHF stations) obviously has an advantage in dealing with any network. In markets with three VHF stations, this factor leaves the parties in roughly equal positions. See, 2 Final Report of the Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* 257 (1980). In markets with four or more VHF stations, the theoretical availability of a competitively equivalent alternate outlet favors the network.

⁶⁴The networks and affiliates have only recently concluded that adjustments in their previous contractual relationships are required in light of contemporary economic conditions. See BROADCASTING MAGAZINE, October 21, 1991, pp 23-25.